

**NOV 23 2005**

**NOT FOR PUBLICATION**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT JOSEPH MARSHALL,

Defendant - Appellant.

No. 03-10209

D.C. No. CR-01-00130-LDG

MEMORANDUM\*

On Remand from the United States Supreme Court

Before: LAY,\*\* HAWKINS, and BYBEE, Circuit Judges.

Robert Joseph Marshall appealed his conviction for conspiracy to distribute a controlled substance, distribution of a controlled substance, and aiding and abetting. 18 U.S.C. §§ 841(a)(1), 846; 8 U.S.C. § 2. We affirmed his conviction.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

120 Fed. Appx. 680 (9th Cir. 2005). On October 3, 2005, the Supreme Court vacated our earlier judgment and remanded for further consideration in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

Marshall did not challenge his sentence on Sixth Amendment grounds. We remand to the district court to determine whether the district court would have imposed a different sentence had he known that the guidelines are advisory as opposed to mandatory. *See United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). We adhere to the reasoning of our prior memorandum disposition in all other respects.

**CONVICTION AFFIRMED; REMANDED.**